

**OFFICE OF THE GENERAL COUNSEL**  
**Division of Operations-Management**

**MEMORANDUM OM 10-48**

March 26, 2010

**TO:** All Regional Directors, Officers-in-Charge,  
and Resident Officers

**FROM:** Richard A. Siegel, Associate General Counsel

**SUBJECT:** Revised Direction Regarding Litigation Holds

As set forth in Memorandum OM 07-64, when the Agency learns of pending or expected litigation, Agency counsel must institute a litigation hold. A "litigation hold" is a directive to suspend normal document disposal procedures and preserve documents, including all e-mails and other electronically stored information, which may be relevant to pending or reasonably foreseeable litigation. A litigation hold may be initiated by the Region, Special Counsel<sup>1</sup> or other General Counsel branches within the Agency. When a litigation hold issues, paper documents as well as electronic information and records, must be preserved by the Agency no matter how inconsequential the document.<sup>2</sup> The litigation hold supersedes Agency retention rules that would otherwise allow routine deletion of certain electronic information and records. It will also require preserving paper documents as well as electronic information and records that could have been, but were not, deleted under the Agency's record retention rules prior to the litigation hold. E-mail messages must be placed in a special location where they will be secure from any routine e-mail deletion protocols.<sup>3</sup>

In addition to cases where Agency counsel outside the Region specifically notifies a Region of the necessity for a litigation hold, the Region should also implement a litigation hold whenever the Region reasonably foresees the possibility of litigation in a

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<sup>1</sup> Cases in which Special Counsel will issue a litigation hold may include, inter alia, personnel and procurement related litigation.

<sup>2</sup> The Board agent assigned to the case would be responsible for ensuring that all documents are preserved. When drafting any document, including an e-mail, Board agents should be mindful that it may potentially be provided to the opposing party during the discovery process.

<sup>3</sup> The duty of a party to suspend its routine document retention/destruction policy and put in place a litigation hold attaches when that party reasonably anticipates litigation. While the resolution of when litigation is reasonably foreseeable is fact specific, it is clear that the obligation to preserve evidence can attach before the formal filing of a lawsuit. Zubulake v. UBS Warburg, LLC, 217 F.R.D. 309 and 220 F.R.D. 212, 217 (S.D. N.Y. 2003). When a party has a duty to preserve relevant information but fails to do so, the penalties for the transgression can be severe and include the possibility of having the court direct an adverse verdict. See, e.g., Silvestri v. General Motors Corporation, 271 F.3d 583 (4<sup>th</sup> Cir. 2001).

federal circuit or federal district court.<sup>4</sup> The current instructions as to when to institute a litigation hold are set forth in Memorandum OM 07-64. Upon further review, however, it has been concluded that it is necessary to revise these instructions.

When there is a demand during discovery in a district court or circuit court proceeding for production of witness affidavits and the party seeking such production asserts that the pre-decisional affidavits taken by a Region were merely “investigatory” and therefore not in anticipation of litigation, we have successfully argued that all affidavits are protected by the attorney work product privilege because the NLRB is a litigation agency and that, therefore, litigation can be anticipated at the time a charge is filed. In order to take a consistent position with respect to when the Agency reasonably anticipates litigation, it is necessary to revise the instructions for initiating litigation holds as follows:

- Since many unfair labor practice charges do not raise issues that would warrant Section 10(j) relief, it is unnecessary to place a litigation hold whenever a charge is filed. However, at the time a Region determines that Section 10(j) injunctive relief or 10(j) contempt proceedings are appropriate, a litigation hold must be instituted immediately. The litigation hold would remain in effect until there is a final decision that Section 10(j) injunction or contempt proceedings are not warranted, the Board issues its order in the underlying case, all injunction litigation is completed, or the underlying case is otherwise closed.
- When a Region concludes that an alleged violation of Section 8(b)(4)(A), (B) or (C), 8(b)(7) or 8(e) is meritorious, a litigation hold must be instituted immediately. The litigation hold would remain in effect until there is a final decision that Section 10(l) injunction proceedings or 10(l) contempt proceedings are not warranted, the Board issues its order in the underlying case, all injunction litigation is completed, or the underlying case is otherwise closed.
- When a charge is filed that alleges violations of the Act that are arguably encompassed by an outstanding court judgment enforcing a Board order, a litigation hold should be instituted immediately. Such charges would include instances when the allegations involve the same section of the Act as the court judgment or involve a different section of the Act but might reasonably be expected to raise the possibility of contempt. A litigation hold must also be implemented immediately upon receipt by a Region of an allegation asserting non-compliance by a respondent with any affirmative or negative provision(s) of a judgment, even if no new ULP charge is filed. Whenever there is any uncertainty as to the appropriateness of implementing a litigation hold, Regions should err on

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<sup>4</sup> When noting federal circuit litigation, we are not including cases involving routine enforcement or review of Board orders. As explained below, litigation hold issues may arise in such proceedings when the Region recommends contempt or injunctive relief under Section 10(e).

the side of imposing a litigation hold. The litigation hold should be maintained until a final determination is made that the new allegations are clearly not encompassed by the terms of the earlier judgment, lack merit, or are otherwise not actionable in contempt.

- Whenever the Region recommends initiation of Section 10(e) injunction proceedings (in circuit court), a litigation hold should be instituted immediately for the entire unfair labor practice file and any related files. The litigation hold should remain in effect until a final decision is made to not seek a 10(e) injunction or until there has been a final court ruling on our request for 10(e) relief.

In those cases and any other situations where the Region reasonably foresees the possibility of litigation<sup>5</sup> or learns of expected litigation in federal district court, the Region should, at a minimum, take the following steps to ensure that relevant electronic documents are preserved.

1. By e-mail or otherwise in writing, advise staff members likely to have relevant electronic documents to take steps to ensure that those documents are not deleted.
2. Create a "Litigation Holds" folder on the Region's common drive or, in the alternative, in its eRoom and mark the folder and its subfolders as Read Only so they are not inadvertently changed.<sup>6</sup>
3. In the "Litigation Holds" folder, create a case folder for each case or group of cases that is the subject of a litigation hold. The case folder should be named using the lead (oldest) case number followed by the words "Litigation Hold", e.g. 50-CA-34567 Litigation Hold.
4. Place in the case folder (e.g. 50-CA-34567 Litigation Hold) copies of all electronic documents (including drafts) and e-mails related to the case(s).<sup>7</sup> Documents and e-mails related to the case that are created or received after the folder is created should also be placed in this folder.

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<sup>5</sup> District court litigation would include subpoena enforcement proceedings. The litigation hold would become effective upon a decision by the Region to seek enforcement of the subpoena.

<sup>6</sup> To make the folder Read Only, go to My Computer and find the Litigation Holds folder. Then right click on that folder and select Properties (at the bottom). Click (probably twice) until a black check mark appears in the Read Only box. Click the OK button. Click OK again when asked if you want to apply changes to this folder, subfolders and files. A file should be made Read Only through My Computer rather than opening the file in WORD, so you do not have to save the file, which would alter its last modified date.

<sup>7</sup> To make a copy of an e-mail, open the e-mail, click on File and then Save As, and save the e-mail as either a text file or an html document. If the e-mail includes attachments, the attachments must be saved separately unless the original format of the e-mail was a "rich text"

After a litigation hold is initiated, Regions should remind relevant personnel every 60 to 90 days to continue preserving all paper and electronic documents. Additional guidance on litigation hold procedures may be provided by Agency counsel when notifying the Region of a litigation hold.

If you have any questions regarding this memorandum, please contact your AGC or Deputy, the Injunction Litigation Branch or the Contempt Litigation and Compliance Branch.

/s/  
R.A.S.

cc: NLRBU

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format. Other electronic documents may be copied to the folder by dragging and dropping them into the new litigation hold folder.